

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN EMPIRE SURPLUS LINES	:	
INSURANCE COMPANY	:	Docket No. 08-CV-1208 (WHP)
	:	
Plaintiff,	:	
	:	
-against-	:	
	:	<b><u>RULE 56.1 STATEMENT</u></b>
WESTCHESTER FIRE INSURANCE COMPANY	:	
and GRZEGORZ MATERNIK	:	
	:	
Defendants.	:	
	:	
-----X		

The Plaintiff, American Empire Surplus Lines Insurance Company (“American Empire”), by and through its counsel, L’Abbate, Balkan, Colavita & Contini, LLP, pursuant to Civil Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York, contends in connection with its Motion for Summary Judgment that there is no genuine issues to be tried with respect to the following facts:

1. American Empire issued a Commercial General Liability insurance policy to Monadnock Construction, Inc. (“Monadnock”), bearing Policy No. 4 GL 9 63 25, for the period June 16, 2004 to June 16, 2005. (See the Declaration of James McGuire sworn to the 30<sup>th</sup> day of May, 2008 (“McGuire Declaration”) ¶ 2, Exhibit “A” attached thereto.)

2. American Empire has recognized Edgemere By-The-Sea Corp. (“Edgemere”) as an additional insured under its Commercial General Liability policy in connection with the action entitled: “Grzegorz Maternik v. Edgemere By-The-Sea Corp. and Monadnock Construction, Inc.” (Index No. 18148-05), in the Supreme Court of the

State of New York, Kings County (“Underlying Action”). (See McGuire Declaration ¶ 3, Exhibit “B” attached thereto.)

3. The American Empire policy provides that its coverage is excess to “[a]ny other primary insurance available to [Monadnock and Edgemere] covering liability for damages arising out of the premises or operations for which [Monadnock and Edgemere] have been added as an additional insured by attachment of an endorsement.” (See McGuire Declaration ¶ 4, Section IV.(4)(b)(2) of Exhibit “A” attached thereto.)

4. On November 15, 2004, Grzegorz Maternik, an employee of Gateway Demolition Corp. (“Gateway”), allegedly sustained bodily injuries after falling from an elevated height while working at a construction project located at 40-11 Beach Channel Drive, Rockaway, New York (“the Premises”). (See McGuire Declaration ¶ 5, Exhibit “C” at ¶ 16 attached thereto .)

5. Prior to that time, on August 1, 2004, Edgemere, the owner of the Premises, entered into a written agreement with Monadnock to serve as the general contractor for the construction project. (See McGuire Declaration ¶ 6, Exhibit “D” attached thereto.)

6. On July 17, 2004, Monadnock entered into a written agreement with Gateway, the named insured of Defendant Westchester Fire Insurance Company (“Westchester Fire”), and subcontracted certain demolition work to Gateway. (See McGuire Declaration ¶ 7, Exhibit “E” attached thereto.)

7. The July 17, 2004 agreement entered into between Monadnock and Gateway provided that prior to commencement of work, Gateway was required to name Monadnock and Edgemere as additional insureds on its insurance policies, including its Commercial General Liability insurance policy. (See McGuire Declaration ¶ 8, Subcontractor Rider 3 of Exhibit “E” attached thereto.)

8. The Monadnock/Gateway agreement also provided that Gateway “agrees to defend, indemnify and hold harmless, Monadnock Construction, Inc., [and Edgemere],...against any and all liability, cost, damage, injury and expenses, including but not limited to legal fees, in any way relating to the performance of this Subcontract, provided that such liability is not due to the sole, affirmative negligent acts of themselves.” (See McGuire Declaration ¶ 9, Subcontractor Rider 3 of Exhibit “E” attached thereto.)

9. On or about June 18, 2005, Maternick commenced the Underlying Action seeking recover for the bodily injuries he alleged sustained on November 15, 2004. (See McGuire Declaration ¶ 10, Exhibit “C” attached thereto.)

10. On July 18, 2005, American Empire issued correspondence to Monadnock indicating that it would be providing Mondanock with a defense in connection with the Underlying Action. (See McGuire Declaration ¶ 11, Exhibit “F” attached thereto.)

11. On September 26, 2005, American Empire issued correspondence to Edgemere indicating that it would be providing Edgemere with a defense in connection with the Underlying Action. (See McGuire Declaration ¶ 12, Exhibit “B” attached thereto.)

12. On October 6, 2005, defense counsel for Monadnock and Edgemere issued correspondence to Gateway tendering the defense and indemnification of both Monadnock and Edgemere in connection with the Underlying Action. (See McGuire Declaration ¶ 13, Exhibit “G” attached thereto.)

13. On October 19, 2005, Westchester Fire issued correspondence to defense counsel for Monadnock and Edgemere denying an obligation to provide additional insured coverage, claiming that it had not received timely notice of the matter from either Monadnock or Edgemere. (See McGuire Declaration ¶ 14, Exhibit “H” attached thereto.)

14. On or about December 15, 2005, as a result of Westchester Fire’s declination of additional insured coverage, a third-party action was commenced against Gateway on behalf of both Monadnock and Edgemere. (“Third Party Action”). (See McGuire Declaration ¶ 15, Exhibit “I” attached thereto.)

15. Westchester Fire has and continues to defend Gateway in the Third-Party Action having accepted the notice provided to it by Gateway as timely. (See McGuire Declaration ¶ 16, Exhibit “J” attached thereto.)

DATED: Garden City, New York  
May 30, 2008

Respectfully submitted,

L'ABBATE, BALKAN, COLAVITA  
& CONTINI, L.L.P.

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